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## THE COMMERCE CLAUSE AS A RESTRICTION ON STATE TAXATION

### INTRODUCTION

**I**N THE discussion of a topic of this nature, my purpose is to restrict and not to enlarge the field of available evidence. The immense powers granted to Congress under the commerce clause are too well known, and the magnitude of their extension by the definition of the word "commerce" cannot be comprehended in a restricted dissertation such as this. Thus, the topic itself sets limits to our range. It concerns itself with the existence of two powers, the paramount congressional control over commerce and the state's powers to tax. Both are inclined to encroach upon the prerogatives of the other, and it is with an attempt to define that point where the line has been and should be drawn by the courts that this essay is written.

The commercial power has already been said to be paramount,<sup>1</sup> and when it is exercised or when it is recognized to be exclusive no power may bar its path. The right to taxation, also, if it exists, is a right which in its nature acknowledges no limits.<sup>2</sup> Even when it undeniably exists and no restriction as a paramount power withdraws the subject from its regulation, the arbitrariness of the tax or the rate or the method are all matters of legislative discretion.<sup>3</sup> But taxation possesses a double nature, of revenue and regulation. In this latter garb it is at odds with the commerce power when it deals with subjects over which the Constitution has been granted an exclusive control. This regulative nature of taxation was clearly a recognized principle of the very earliest days. Madison in 1787 spoke of it as follows:

"The line of distinction between the power of regulating trade and that of deriving revenue from it, which was once

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<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>2</sup> *Weston v. Charleston*, 2 Pet. 449.

<sup>3</sup> *Delaware R. R. Tax*, 18 Wall. 206; *Steamship Co. v. Pennsylvania*, 122 U. S. 326.

considered a barrier to our liberties, was found upon discussion to be absolutely indefinable."<sup>4</sup>

Its regulative power finds, perhaps, its strongest expression in Chief Justice Marshall's dictum that the power to tax is the power to destroy.<sup>5</sup> Thus we see the strength of the powers with which we have to contend.

In a field such as this the validity of any tax is always determined by its effect, not by the manner in which it is laid. "A state cannot do that indirectly which she is forbidden by the Constitution to do directly."<sup>6</sup> So the rule is that its constitutionality depends upon its effect on that subject whereon it is really laid. To make a tax valid, it must also be shown that the subject itself is within the jurisdiction of the state.<sup>7</sup> The state power, too, extends to all things within its jurisdiction save to those which the Constitution withdraws from its control,<sup>8</sup> and these things are for us the subjects essential to the free flow of interstate commerce.

With these general principles in mind, we can now proceed to a specific basis for discussion. For the purpose of clarity and exactness I have divided the general subject into six groups, which will be treated of under these distinctive headings:

- I. The taxation of property in transit.
- II. The taxation of persons in transit.
- III. Privilege and occupation taxes.
- IV. Discrimination.
- V. The control of foreign corporations by the state and the extent to which they receive protection by the Federal Government under the commerce clause.
- VI. The general power of the state to tax property and its relation to the commerce clause, including the mention of the miscellaneous powers of the state heretofore untouched.

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<sup>4</sup> Letters of Madison to Jefferson, Oct. 24, 1787. Conf. Chatham's speech in the House of Lords as given in Thackeray's *LIFE OF CHATHAM*, vol. 2, p. 281.

<sup>5</sup> McCulloch v. Maryland, 4 Wheat. 316.

<sup>6</sup> Passenger Cases, 7 How. 283.

<sup>7</sup> St. Louis v. Ferry Co., 11 Wall. 423.

<sup>8</sup> McCulloch v. Maryland, 4 Wheat. 316.

## TAXATION OF PROPERTY IN TRANSIT

In the discussion of such a subject as the taxation of property in transit, it is an axiom of constitutional interpretation that, because of the nature of congressional power over commerce, in that it is exclusive,<sup>9</sup> property while in transit is untaxable.<sup>10</sup> With this fact assured as a working basis, it is necessary then to define when property can be said to be in transit, or can, in broader terms, be said to be a subject of interstate commerce, in order that it may be possible to determine when the duration of federal protection under the commerce clause withdraws the article from the operation of the state power of taxation.

In general, it may be said that the doctrine voiced first in *Brown v. Maryland*,<sup>11</sup> and finding its fuller expression in *Welton v. Missouri*,<sup>12</sup> that the property must be protected from hostile state legislation until it has become part of the general property of the state, namely, as long as it is in transit, still holds, though modified in meaning by subsequent interpretation. But when does this point in all exactness occur? Chief Justice Marshall, in *Brown v. Maryland*, attempted to define it by means of the "original package" doctrine; but, though this principle is still valid when applied to imports from foreign countries, its application in interstate commerce was impossible of realization, and in application would have been unjust, and it was finally discarded as a point by which to limit the right of the state to tax,<sup>13</sup> though it still has an important function in this field of determining the boundary line of the state's police power.<sup>14</sup> The

<sup>9</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>10</sup> *Kelley v. Rhoads*, 188 U. S. 1.

<sup>11</sup> 12 Wheat. 419.

<sup>12</sup> 91 U. S. 275: "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection and to no greater burdens."

<sup>13</sup> *American Steel and Wire Co. v. Speed*, 192 U. S. 500; for its injustice in practice see Mr. Justice Miller's opinion in *Woodruff v. Parham*, 8 Wall. 123: "But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

<sup>14</sup> See *Leisy v. Harden*, 135 U. S. 100; and also the recognition of this fact by Congress in the Wilson Act of 1890.

modern doctrine is to be anticipated in the case of *Woodruff v. Parham*,<sup>15</sup> and comes to its consummation in the case of *American Steel and Wire Co. v. Speed*.<sup>16</sup>

To begin at the beginning, an article cannot be in transit until it is actually and physically so. It does not become an article of interstate commerce until it commences its final movement for transportation from one state to its destined point in another state.<sup>17</sup> This point occurs when it is committed to the care of a common carrier. The question of the carrier is unessential as long as such carrier has a continuous communication with other carriers that extend the line of communication from one state to another.<sup>18</sup> Hence the mere intention of the producer or the manufacturer cannot put this article in transit and place it within the pale of interstate commerce.<sup>19</sup>

Then, having once become articles of interstate commerce, they remain so as long as they are in transit, until the property arrives at its final destination or at some point of destination where it awaits a sale.<sup>20</sup> The passage of such articles through a state cannot be touched, even though their line of passage may not be the most direct road to their destination.<sup>21</sup> It is under the assumption that any regulation such as taxation imposed by a state upon the act of transportation is an attempt to regulate interstate commerce,

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<sup>15</sup> 8 Wall. 123.

<sup>16</sup> 192 U. S. 500.

<sup>17</sup> *Coe v. Errol*, 116 U. S. 517.

<sup>18</sup> The Daniel Ball, 10 Wall. 557. However, an exception is made in regard to mere carts or other vehicles which transport the property only to the actual depot. Also floating to the depot, as the floating of logs downstream to a point where they will be shipped by a common carrier, is within this exception. *Coe v. Errol*, 116 U. S. 517.

<sup>19</sup> *Kidd v. Pearson*, 128 U. S. 1, and *Coe v. Errol*, 116 U. S. 517; *United States v. E. C. Knight & Co.*, 156 U. S. 1. Thus, in *Larabee Flour Mills Co. v. Missouri & Pacific Ry. Co.*, 74 Kan. 808, 88 Pac. 72, the mere intention of the owner to use cars for transportation was not sufficient to make them articles of interstate commerce.

<sup>20</sup> *Brown v. Houston*, 114 U. S. 622.

<sup>21</sup> *Kelley v. Rhoads*, 188 U. S. 1. (Sheep driven across the State of Wyoming, though the route was not the shortest to their destination, were held to be exempt from local taxation as property in transit, although they subsisted partly by grazing on the roadside.)

the exclusive nature of which in this department has been affirmed,<sup>22</sup> that this doctrine has its basis. Thus, when the transportation is within or through a state or from one state to another, no tax or regulation may be laid by the state on such transportation or "upon the transporter because of such transportation";<sup>23</sup> for the nature of any tax is to be determined, not by the form or agency through which it is collected, but by the subject upon which the burden is imposed.<sup>24</sup> The fact that the same burden is placed upon intrastate transportation is wholly irrelevant. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce."<sup>25</sup>

So far we have considered property in continuous movement as being in transit; we now turn to the fact of temporary detention as affecting the character of property in interstate commerce. The facts of each particular case are actually decisive in coming to any agreement of this sort, but certain general principles may be determined. If detention consists in the stoppage of transportation, due to storm, accident or act of God, such an act is unreservedly considered to have no legal effect upon the interstate character of the commerce.<sup>26</sup> Again, if this detention is due to the fact of convenience on the part of the carrier, and the property has not reached its final destination, the interstate character of the property is not lost. Thus, temporary detention of a dining-car does not make it cease from being an article of interstate commerce;<sup>27</sup> or through freight cars that were temporarily detained and left standing, and not delivered to the consignee have not completed the interstate

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<sup>22</sup> "The rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national they may justly be said to be of such a nature as to require exclusive legislation. (Citing *Cooley v. Port Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713; *Crandall v. Nevada*, 6 Wall. 42.) Surely, transportation of passengers or merchandise through a state, or from one state to another, is of this nature. *State Freight Tax Case*, 15 Wall. 232.

<sup>23</sup> *State Freight Tax Case*, 15 Wall. 232.

<sup>24</sup> *Brown v. Maryland*, 12 Wheat. 419.

<sup>25</sup> *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

<sup>26</sup> I have been unable to find any case bearing upon this point, but this is to be inferred from the general principles of jurisprudence as laid down by *Holland*, 12th ed., p. 297.

<sup>27</sup> *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1.

transportation of property;<sup>28</sup> and the mere holding of liquor for a few days to suit the convenience of a consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as interstate commerce.<sup>29</sup> An interesting and important decision on this point was recently handed down by the Supreme Court,<sup>30</sup> where it was determined that in cases where the commodities are destined from one state to another, rebilling or reshipment en route does not break the continuity of the movement, for the essential character of commerce and not the accident of through or local bills of lading character determines whether it is interstate or intrastate.<sup>31</sup> In all these cases it will be noticed that the fundamental idea is that of the continuity of commerce, while temporary detention is allowable as long as the facts show that what is included under the terms temporary shows a reasonable delay.<sup>32</sup>

We now come to the determination of the point which marks the cessation of federal protection over the property—in fact, the point when it ceases to be in transit and where the power of the state to tax all subjects within its jurisdiction may be asserted. That the original package doctrine does not apply<sup>33</sup> has been stated above,

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<sup>28</sup> McNeill v. Southern Ry. Co., 202 U. S. 543, affirming Southern Ry. v. Greensboro Ice and Coal Co., 134 Fed. 82. (Here the state could not require cars loaded with coal, which were shipped in from another state, to be switched to the sidetrack of a consignee, because they were subjects of interstate commerce.)

<sup>29</sup> Adams Express Co. v. Kentucky, 206 U. S. 129, reversing 87 S. W. 1111, 27 Ky. Law Rep. 1096. In accord is Adams Express Co. v. Kentucky, 206 U. S. 139.

<sup>30</sup> Western Oil Refining Co. v. Lipscomb, 244 U. S. 346.

<sup>31</sup> In this case the plaintiff shipped into the state a tank car of oil and a carload of barrels. His agent, in order to fill the orders in the state, drew the oil from the tank car into the barrels and made delivery at the same time. The cars were filled, and were thence rebilled to another point in the state, where the remainder were filled. The plaintiff's original intention was that the cars should remain at the first place only long enough to fill the orders from there, and should then proceed to the second point. This was held to be a continuity of commerce sufficient for interstate commerce.

<sup>32</sup> In Kelly v. Rhoades, 188 U. S. 1, it was remarked that storage for an indefinite time would subject the property in transportation to state taxation.

<sup>33</sup> See the License Cases, 5 How. 504, where C. J. Taney recognizes the distinction between the original package doctrine of Brown v. Maryland as applied to foreign commerce and as applied to interstate commerce.

and the general test to be applied is whether the property has actually reached its destination or not. If so, it has ceased to be interstate commerce and has been incorporated with the general mass of property within the state. The construction of the commerce clause would then maintain that in it no intention exists to prohibit the right of a state to tax articles brought into it from another,<sup>34</sup> *when they have reached their destination*. Justice Miller examines the opposite doctrine and shows how injudiciously it would work to destroy the rights of the state over its own subjects and commerce in the case of *Woodruff v. Parham*. This destination is deemed to have been reached when the goods are stored awaiting sale, as coal barges moored in a river for sale after having arrived from another state.<sup>35</sup> Such a tax, however, cannot discriminate;<sup>36</sup> it must be the general tax laid alike upon all property within the city. The tax then is not placed upon the goods by reason of their coming within the state's jurisdiction, which would constitute a regulation of commerce, but by reason of their being within the state's jurisdiction not in transit but as part of the general mass of property therein. The property has actually acquired a *situs* there, and the law recognizes this fact. Thus, property that is placed in storage for later distribution has ceased to be in transit and is taxable,<sup>37</sup> whether it is later shipped within or without the state.<sup>38</sup> The court has ably recognized that storage is in itself a business, and has a purpose outside the mere

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<sup>34</sup> *Woodruff v. Parham*, 8 Wall. 123.

<sup>35</sup> *Brown v. Houston*, 114 U. S. 622.

<sup>36</sup> For discussion of this, see the portion entitled "Discrimination."

<sup>37</sup> *American Steel and Wire Co. v. Speed*, 192 U. S. 500; *Pittsburgh, etc., Coal Co. v. Bates*, 156 U. S. 577 (coal in boats and barges moored in the state and awaiting orders for further disposal thereof was held taxable); *Susquehanna Coal Co. v. Mayor of South Amboy*, 228 U. S. 665 (coal was stored at a point in transit for purposes of distribution. It was shipped to a point in New Jersey, dumped there, and later transferred to bottoms as occasion required. It was held that this was more than an incidental interruption of the continuity of commerce); *General Oil Co. v. Crain*, 209 U. S. 211 (here the oil was stored, after reaching its first destination, for distribution, and held taxable); *Diamond Match Co. v. Ontonagon*, 188 U. S. 82 (logs were held in the river to be shipped as needed). See note in 52 L. ed. 755, dealing with this subject.

<sup>38</sup> *American Steel and Wire Co. v. Speed*, *supra*; *General Oil Co. v. Crain*, *supra*.

transportation of the goods.<sup>39</sup> The protection of interstate commerce does not extend to the final sale of the product.<sup>40</sup> The pause for business conveniences, when adopting such a form, destroys the interstate commerce character of the article.<sup>41</sup> When the transit of property is interrupted and the goods are held in the state for the purpose of undergoing part of the process of manufacture, after which they will again be shipped on, they are held to have a *situs* there and are thus taxable.<sup>42</sup> Or when the pause for the business convenience assumes some such form as the removal of the goods from the cars, their redistribution and their reshipment, when this point has been used constantly for this purpose, then the goods have been held taxable.<sup>43</sup> Facts which definitely interrupt the continuity of movement being established form a basis for the release of the goods from the protection given them under the commerce clause and their surrender to the taxing power of the state. In general, it may be said that a study of the various cases embodying this doctrine of transit and *situs* reveal reveals the fact that fair and equitable considerations have led to the attitude taken by the courts on their delineation of the principles underlying each case.

#### PERSONS IN TRANSIT

A brief excerpt, portraying how the broader doctrine underlying the protection of property in transit has been extended for the same purpose to persons in transit to protect them from regulative and revenue measures of the states imposed through their taxation powers, may not be out of place here. Though the term commerce had been defined in its broadest terms by Chief Justice Marshall,<sup>44</sup>

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<sup>39</sup> As in *General Oil Co. v. Crain*, *supra*, and in *Swift v. United States*, 196 U. S. 375.

<sup>40</sup> *Banker Bros. v. Pennsylvania*, 222 U. S. 210.

<sup>41</sup> But see the borderline case on this question, *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 236, mentioned above.

<sup>42</sup> *Standard Oil Co. v. Coombs*, 96 Ind. 179; 49 Am. Rep. 156.

<sup>43</sup> *Bacon v. Illinois*, 227 U. S. 504. (Here the grain was removed from the car in transit for the purpose of inspecting, weighing and cleaning, and then held taxable.) This overthrows the doctrine of *State v. Engle*, 34 N. J. Law 425 (1871), when property in transit to market outside the state was delayed merely for separation and assortment and held exempt.

<sup>44</sup> *Gibbons v. Ogden*, 9 Wheat. 1: "Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse."

the sweeping significance of his doctrine was not established by its mere assertion, and for a time the Supreme Bench hesitated before extending it from the meaning of the interchange of goods, merchandise, or property of any kind to the transportation and transit of persons.<sup>45</sup> Thus, when the Port of New York passed a regulation requiring each captain of an entering vessel to report the number of passengers on board to the authorities, such a regulation was upheld on the ground that commerce did not extend to persons and these regulations then could not be repugnant to the exclusive nature of congressional control over commerce.<sup>46</sup> But later a state statute placing a tax upon all persons coming from foreign countries was held void and unconstitutional<sup>47</sup> by a majority of the court,<sup>48</sup> thus reversing in part the former decision. The effect of this decision is to be found in the famous case of *Crandall v. Nevada*,<sup>49</sup> though here the decision rested upon the other grounds.<sup>50</sup> Thus, there seemed to have been some doubt in the minds of the court as to where exactly this power over persons might be included, though there was scarcely any doubt as to the fact that the national govern-

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<sup>45</sup> "Commerce \* \* \* consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691. And its full expression is given in *Champion v. Ames*, 188 U. S. 352: "Commerce \* \* \* embraces navigation, intercourse, communication, the transit of persons, and the transmission of messages by telegraph."

<sup>46</sup> *The Mayor of New York v. Miln*, 11 Pet. 102.

<sup>47</sup> *Passenger Cases*, 7 How. 283.

<sup>48</sup> C. J. Taney in his dissenting opinion upheld the right of the state to place such a tax, refusing to admit the exclusive nature of the commerce power, and holding that the question whether commerce included persons was already settled by the cases of *Holmes v. Jennison*, 14 Pet. 540; *Groves v. Slaughter*, 15 Pet. 449; and *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539.

<sup>49</sup> 6 Wall. 35.

<sup>50</sup> Namely, that an essential condition of the operation of constitutional government was the right of free movement and transportation, and that the right of the citizen "to come to the seat of the government to assert any claim that he may have upon that government, to transact business he may have with it, to seek its protection, to share its offices, to engage in administering its functions," must be protected from any state aggression.

ment possessed it.<sup>51</sup> Justice Clifford maintained that it was to be included under Article 4, Section 2 of the Constitution, in the privileges and immunities clause.<sup>52</sup> Whether it springs from the sovereignty possessed by the national government or from its commerce power can still be said to be an open question, though the tendency exists to regard the exclusiveness of the commerce power as a basis for making void any regulative state restrictions,<sup>53</sup> while the sovereign powers possessed by the national government are regarded as the source of the right of Congress to tax and exclude foreigners.<sup>54</sup>

#### PRIVILEGE AND OCCUPATION TAXES

No restrictions, whether regulative or prohibitive, can be imposed under the authority of any state upon transportation within the scope of the commerce clause. These instructions usually take the form of requiring the payment of a tax before commerce may be indulged in, and are commonly known as licenses or privilege and occupation taxes. As has been said before, a tax must be measured not by the object upon which it is placed, but by the effect which it produces; and therefore these taxes when amounting to a burden upon interstate commerce must be void because repugnant to the exclusive nature of the congressional control over commerce.<sup>55</sup> The

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<sup>51</sup> This power of the national government was upheld by the Alabama Supreme Court in *Joseph v. Randolph*, 71 Ala. 499.

<sup>52</sup> *Ward v. Maryland*, 12 Wall. 418.

<sup>53</sup> As in *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; *Henderson v. the Mayor of New York*, 92 U. S. 259, and *Chy Lung v Freeman*, 92 U. S. 275, and in *Wabash, St. L. & P. Ry. v. Illinois*, 118 U. S. 557, the transportation of persons from one state to another was deemed interstate commerce. This fact lay at the basis of the decision in *Hoke v. United States*, 227 U. S. 308, which declared the White Slave Act of June 25, 1910, constitutional; also *Caminetti v. United States*, 242 U. S. 470; and *Athanasan v. United States*, 227 U. S. 326; *Bennett v. United States*, 227 U. S. 333; *Harris v. United States*, 227 U. S. 340. This transportation, moreover, does not need to be limited to a common carrier. *Wilson v. United States*, 232 U. S. 563.

<sup>54</sup> In the top paragraph. *Head Money Cases*, 112 U. S. 580; *Chinese Exclusion Cases*, 130 U. S. 581; *Fong Yue Ting v. United States*, 149 U. S. 698; *United States v. Williams*, 194 U. S. 279.

<sup>55</sup> "No state can interfere with interstate commerce through the imposition of a tax, *by whatever name called*, which is in effect a tax for the privilege of transacting such commerce." *Adams Express Co. v. Ohio State Auditors*, 166 U. S. 185.

effect of such taxes is in general that of making the individual or corporation pay for the privilege of engaging in such commerce in the confines of the state. Thus, businesses which are actually interstate commerce themselves cannot be subjected to a tax. The business of transporting passengers to and from or through a state is untaxable as a business, even though the same amount be levied on the purely interstate business of the company.<sup>56</sup> No license can be required by a state for the privilege of conducting an express company carrying on the business of interstate commerce.<sup>57</sup> Such a privilege tax, similarly, cannot be exacted from a telegraph company on condition of doing business in the state, although domestic as well as interstate business is done,<sup>58</sup> for communication by business is an integral part of commerce.<sup>59</sup> However, a tax may be placed exclusively on intrastate business, so long as this is not made a condition for its carrying on the interstate part of its business.<sup>60</sup> Offices of the agents of interstate commerce are untaxable when the only business they solicit consists of purely interstate character.<sup>61</sup> If intrastate as well as interstate business is transacted at these offices then they are taxable,<sup>62</sup> for in such cases they are at liberty to reject the carrying on of the purely intrastate business. Hence a tax placed upon the privilege of doing intrastate business solely is valid when the company possesses the privilege of either continuing or

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<sup>56</sup> *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, holding void a tax placed upon sleeping cars employed by the defendant, as a burden on interstate commerce. To similar effect is *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51; also *Henderson v. New York*, 92 U. S. 259, and *Passenger Cases*, 7 How. 283.

<sup>57</sup> *Crutcher v. Kentucky*, 141 U. S. 47; also *Barrett v. N. Y.* 232, U. S. 14; and *Platt v. N. Y.*, 232 U. S. 35.

<sup>58</sup> *Leloup v. Mobile*, 127 U. S. 640.

<sup>59</sup> *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.

<sup>60</sup> *Postal Telegraph Co. v. Charleston*, 153 U. S. 692. Even though the intrastate business was done at a net loss. *Williams v. Talladega*, 226 U. S. 404.

<sup>61</sup> *McCall v. California*, 136 U. S. 104, and *Norfolk & Western Ry. Co. v. Pennsylvania*, 136 U. S. 114. This is also true as regards steamship lines, as was determined in *Clyde Steamship Co. v. Charleston*, 76 Fed. 46. For fuller discussion of this subject, especially with regard to its effect upon corporations, see *infra* under the title of "Corporations."

<sup>62</sup> *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U. S. 181; also *Attorney-Gen. v. Electric Storage Battery Co.*, 188 Mass. 239.

giving up this business.<sup>63</sup> It is of no material difference to the case that the intrastate business is a mere fraction compared with the interstate part,<sup>64</sup> or that it does not even pay for itself.<sup>65</sup> This distinguishes these cases from the case of *Leloup v. Mobile*, mentioned above, in which there was no discrimination made in regard to interstate and intrastate commerce.

Similarly, a ferry company cannot be taxed for the privilege of landing its freight and passengers in another state when it has its *situs* within the first state;<sup>66</sup> nor can it be required to procure a license for the privilege of carrying merchandise across a river flowing between two states.<sup>67</sup>

Again, no state can require a license of a vessel which has already been licensed by Congress under its rules and regulations for the coasting trade.<sup>68</sup> An Alabama statute requiring such licenses was declared void since Congress had already legislated upon the subject.<sup>69</sup> And under no condition can such licensing regulate interstate commerce,<sup>70</sup> or be required as a prerequisite to the privilege of navigating a navigable stream within a state.<sup>71</sup>

The businesses which have so far been described are those which

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<sup>63</sup> Osborne v. Florida, 164 U. S. 650, when it was said that "the company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax." And to similar effect are Pullman Co. v. Adams, 189 U. S. 420, and Allen v. Pullman's Palace Car Co., 191 U. S. 171. In the latter case, as well as the former, the company was free to renounce its intrastate business, for under Section 3046 of Shannon's Tenn. Code the common-law rule requiring innkeepers and passenger carriers to serve all people was abrogated.

<sup>64</sup> Pullman Co. v. Adams, 189 U. S. 420.

<sup>65</sup> New York v. Knight, 192 U. S. 21.

<sup>66</sup> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

<sup>67</sup> St. Clair County v. Interstate Sand, etc., Transfer Co., 192 U. S. 454, reversing in part Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365. Or between Canada and a state. Sault Ste. Marie v. International Transit Co., 234 U. S. 333.

<sup>68</sup> Foster v. Davenport, 22 How. 244.

<sup>69</sup> Sinnott v. Davenport, 22 How. 227.

<sup>70</sup> Moran v. New Orleans, 112 U. S. 69, where a license tax was made the condition of owning and running towboats, and declared invalid. In accord, Harmon v. Chicago, 147 U. S. 396.

<sup>71</sup> Gibbons v. Ogden, 9 Wheat. 1.

are engaged strictly in transportation within the commerce clause; but there remain other occupations which depend so wholly upon commerce that they receive a similar protection. General merchandise brokers, who confine themselves entirely to soliciting orders for principals resident in other states, and do local business, are not subjected to a tax laid upon their receipts;<sup>72</sup> but if they also handle local business they are subject to a commission and graduated sale tax.<sup>73</sup>

One important class of such businesses is to be found in agents, peddlers, drummers and solicitors in relation to their protection under the commerce clause. It is entirely valid for a state to lay a tax upon such occupations, as are typified in general by such men, as long as it does not interfere with interstate commerce. When the agent traverses the state soliciting orders for a foreign place of business, and then sends the orders of his customers to the foreign place of business which ships the goods directly to the purchaser, he is engaged in interstate commerce. The leading case upon this is *Robbins v. Shelby County Taxing District*,<sup>74</sup> where the court ably argued that a tax upon a merchant's soliciting orders might amount to prohibiting him from selling in the state, prohibiting him, in fact, from carrying on exactly such commerce as it was the intention of the Constitution to protect. Thus, the general rule underlying all such transactions may be briefly stated by saying when the company ships upon previous contract of sale made by their agent, the occupation of this agent is untaxable. The company may ship directly to the purchaser,<sup>75</sup> or to the agent, also upon previous contract of

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<sup>72</sup> *Stockard v. Morgan*, 185 U. S. 27.

<sup>73</sup> *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, and *Nathan v. Louisiana*, 8 How. 73, where the broker was engaged in dealing with foreign bills of exchange, which the court refused to regard as included in the term commerce.

<sup>74</sup> 120 U. S. 489.

<sup>75</sup> As in *Crenshaw v. Arkansas*, 227 U. S. 389, and *Rogers v. Arkansas*, 227 U. S. 401, declaring an Arkansas statute taxing all solicitors invalid in so far as it applied to agents of this type. *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, where a sewing machine was shipped into the state on a previous contract of sale; *Corson v. Maryland*, 120 U. S. 502; *Brennan v. Titusville*, 153 U. S. 289; *Asher v. Texas*, 128 U. S. 129; *Rearick v. Pennsylvania*, 203 U. S. 507.

sale, who delivers to the purchaser.<sup>76</sup> Goods may be shipped C. O. D. by express, and the sale considered to have been actually made at the home office and not in the state where the purchaser handed over the purchase price to the express agent.<sup>77</sup> A broad development and leeway for the action of the agent is to be found in the "picture-frame cases." In these the agent received pictures and frames shipped separately for the purpose of convenience in shipment; they were put together by him and then delivered to the purchaser. No part of this transaction was held to be separable from interstate commerce and it was thus untaxable.<sup>78</sup> In another case the customer was given the privilege of taking a frame at "factory prices" when the picture was delivered,<sup>79</sup> and in a third the agent gave the customer an option of three different frames.<sup>80</sup> There has been much confusion over the issue presented here, due to the belief that the original package doctrine was thwarted.<sup>81</sup> It was only after a long struggle that the courts rid themselves of the original package as applied to interstate commerce<sup>82</sup> and confined it to foreign commerce alone,<sup>83</sup> which we may hope will soon be abandoned. The great confusion arises because of failing to recognize the fact<sup>84</sup> that it has no bearing upon these cases, but that the fun-

<sup>76</sup> *Stewart v. Michigan*, 232 U. S. 665, where the agent delivered from carloads shipped on orders of purchasers.

<sup>77</sup> *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441—"the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.

<sup>78</sup> *Caldwell v. North Carolina*, 187 U. S. 622. There was an element of discrimination that entered into this case also, for the license tax of Greensboro applied only to the business of selling pictures and picture-frames by non-residents.

<sup>79</sup> *Dozier v. Alabama*, 218 U. S. 124.

<sup>80</sup> *Davis v. Virginia*, 236 U. S. 697.

<sup>81</sup> As in *Rearick v. Pennsylvania*, where brooms ordered by several persons were packed together for convenience of shipment and then the package broken by the local agent for delivery. The agent's business was held to be untaxable. 203 U. S. 507.

<sup>82</sup> See cases mentioned on this fact in "Taxation of Property in Transit."

<sup>83</sup> Because of the impelling precedent of *Brown v. Maryland*, 12 Wheat.

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<sup>84</sup> See, for instance, Justice Holmes' opinion in *Rearick v. Pennsylvania, supra*, where he attempts to pacify the demands of the doctrine and still

damental idea underlying them is the "previous contract of sale upon which shipment is then made *from without the state*."

There is a class of agents and drummers which must be distinguished from this former type. These are peddlers who sell foreign goods within a state directly to the purchaser, carrying about with them such goods for sale. They are subjected to a general tax on the occupation of peddling, for they are not engaged in interstate commerce.<sup>85</sup> The same principle applies in those cases where the agent solicits orders for goods from a foreign company, but the company possesses a distributing warehouse within the state and the goods are shipped from this point within the state to the purchaser who is also within the same state.<sup>86</sup> In this instance it will be noted that the transportation of the article to its final destination, the part of the transaction which could be deemed commerce, occurred wholly within the confines of the state and thus could at most be intrastate commerce. It makes no difference whether the goods were shipped from the distributing house only upon order by the home office, for still the commerce occurred within state lines. In the former case, where the peddler sells foreign goods on hand,

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maintain the division. Also the decision of the Supreme Court of Tennessee in *Loverin & Brown Co. v. Tansil*, 102 S. W. 77, fails to recognize this principle. While in support of this doctrine, see the recent decision of the Supreme Court in *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346.

<sup>85</sup> *Wagner v. City of Covington*, 251 U. S. 95, where a manufacturer of soft drinks has his goods brought into another state and there sold in original packages in such quantities as they desire to purchase, it was held that the business thus transacted is that of an itinerant peddler and may be taxed by that state under a non-discriminating tax law without contravening the commerce clause of the Constitution. To similar effect is *Emert v. Missouri*, 156 U. S. 296, where legislation was upheld against peddlers carrying goods for sale with them.

<sup>86</sup> Thus, in *Sewing Machine Co. v. Brickell*, 233 U. S. 304, a license was required of the agents who secured orders for machines, which were distributed upon these orders from the company's station within the state. Likewise, in *Howe Machine Co. v. Gage*, 100 U. S. 676, where an agent offered for sale sewing machines which, though manufactured in Connecticut, were brought to a point within Tennessee and then shipped to purchasers upon this order. In this case the tax upon peddlers was levied upon all peddlers of sewing machines, without regard to place of their manufacture, as the situation was construed by the Supreme Court of Tennessee. See also *Askren, Attorney General, v. Continental Oil Co.*, 252 U. S. 444.

there is no commerce in the mere transaction of a sale. The interstate commerce has ceased with the arrival of the goods into the hands of the peddler.

The law in regard to foreign commerce—that is, commerce with foreign nations—still follows the “original package doctrine.” Articles while remaining within them cannot be taxed, and therefore no license can be requested of the importer or auctioneer of original packages.<sup>87</sup> The court seems to be burdened with this doctrine as regards foreign commerce, and because of the heavy precedent lying behind it must accede to it, though it is very evident that an importer of goods from a foreign nation is enjoying a privilege which is denied to the domestic importer. As to what is meant by the term imports, it is definitely settled that the word applies only to what is imported from a foreign country,<sup>88</sup> and not to what is imported from another state. The corresponding idea is to be attached to the word “export.”<sup>89</sup>

#### DISCRIMINATION

Discriminatory state legislation seems so closely connected with license taxes that the discussion of one necessarily implies the discussion of the other. Though, as it has been shown, discrimination is not necessary to make invalid a restriction upon transactions within the scope of the commerce clause, for interstate commerce cannot be taxed at all, though the same amount be levied against domestic commerce,<sup>90</sup> still discrimination when found to exist is declared

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<sup>87</sup> Cook v. Pennsylvania, 97 U. S. 566; Brown v. Maryland, 12 Wheat. 419, is still the ruling case law.

<sup>88</sup> Dooley v. United States, 183 U. S. 151 (imports and exports refer to goods from and going to a foreign country only). Also, in Woodruff v. Parham, 8 Wall. 123, Mr. Justice Miller limited the word “import” to duties on foreign imports, and the word “export” to something carried out of the United States. He declared that any other meaning attached would make the power conferred upon Congress allowing it to lay and collect imports nugatory by the subsequent clause of the ninth section forbidding taxes on exports from any state, since an article cannot be exported from a state without being imported into another.

<sup>89</sup> For import as applied to persons, see section entitled “Transit of Persons.”

<sup>90</sup> Robbins v. Shelby County Taxing District, 120 U. S. 489.

repugnant to the idea of the commerce clause. The fundamental idea underlying this protection against discriminatory legislation is the "original package doctrine," namely, that no obstacle can be placed by a state in the way of its mingling and becoming part of the general property of the state.<sup>91</sup> That this type of protection was in the mind of the framers of the Constitution, and prompted their giving the commerce power to the federal government, must be admitted; but that in such cases, when transportation has long come to an end and commerce has ceased to exist, discriminatory legislation should be declared a burden upon commerce seems a broad and inconsistent extension of the commerce clause. That it is unnecessary is also true, for the same protection could be afforded by the federal government under the immunities and privilege clause of the second section of the sixth article of the Constitution<sup>92</sup> or under the equal protection of laws clause of the Fourteenth Amendment,<sup>93</sup> as was done in several cases.<sup>94</sup> However, it is sufficient to note that the above attitude has always been strenuously maintained by the courts.<sup>95</sup>

Confining ourselves solely to discrimination embraced by the term commerce, we notice that several types of such legislation have been declared void. A state may not discriminate against the products of another state as such, or the business or occupation consisting in

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<sup>91</sup> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the county, and subjected like it to similar protections and to no greater burdens." Mr. Justice Field in *Welton v. Missouri*, 91 U. S. 275.

<sup>92</sup> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

<sup>93</sup> "No state shall \* \* \* deny to any person within its jurisdiction the equal protection of its laws."

<sup>94</sup> *Ward v. Maryland*, 12 Wall. 418 (Art. IV, Sec. 2), and *New York v. Roberts*, 171 U. S. 662 (Fourteenth Amendment).

<sup>95</sup> "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin." *Welton v. Missouri*, 91 U. S. 275. "No discrimination can be made by such regulations adversely to the persons or property of other states." *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

the sale of these goods, which as a license tax is in effect a tax upon the goods themselves. These license taxes differ from those mentioned above, in that they are imposed upon persons peddling or selling goods produced or manufactured without the state, whereas no license is required for the same trade in regard to domestic goods.<sup>96</sup> Similarly, a city, although it owns certain wharves, cannot permit their use free of charge to all vessels landing at them laden with products of its own state, and require a charge, even though not in excess of reasonable compensation for the use of the city's property, from all other vessels.<sup>97</sup> A state may not discriminate against foreign products or against the occupation of selling them.<sup>98</sup> Again, a state may not tax patented articles so as to discriminate against manufactures of other states.<sup>99</sup> It cannot tax property within the state which is the product of the soil of another state, and at the same time exempt the property of its own produce.<sup>100</sup>

Inspection, also, when imposing an unnecessarily onerous burden upon transportation, becomes discriminative and thus invalid. This has been applied to the inspection of meat, where the clear intent of the statute was to tax meats coming in from other states and exempt those meats slaughtered near by.<sup>101</sup> Discrimination under the guise of inspection out of the state was severely assailed, although in the particular case the method and means of the statute showed nothing apprehensive of discrimination, but solely an attempt to improve the type of goods exported.<sup>102</sup>

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<sup>96</sup> Thus, in *Welton v. Missouri*, 91 U. S. 275, was held void a license tax upon peddlers of foreign goods. And in *Walling v. Michigan*, 116 U. S. 446, Justice Bradley said: "None of the cases sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state." In accord is *Tiernan v. Rinker*, 102 U. S. 123.

<sup>97</sup> *Guy v. Baltimore*, 100 U. S. 434.

<sup>98</sup> *Cook v. Pennsylvania*, 97 U. S. 566; *Commonwealth v. Caldwell*, 190 Mass. 355, 76 N. E. 955, when a license was required for peddling products of foreign countries only.

<sup>99</sup> *Webber v. Virginia*, 103 U. S. 334.

<sup>100</sup> In *M. Darnell & Son Co. v. Memphis*, 208 U. S. 113.

<sup>101</sup> *Minnesota v. Barber*, 136 U. S. 313. In accord is *Brimmer v. Ribman*, 138 U. S. 78.

<sup>102</sup> *Turner v. Maryland*, 107 U. S. 56.

A difference merely in the method of collecting the tax on domestic products and foreign products is valid if no discrimination is shown. Thus, an Alabama statute placing a tax on liquors, with such an effect that the tax upon liquors manufactured in the state was paid by the distillers and the tax upon foreign liquors was levied upon those who sold them, was held valid.<sup>103</sup>

In all these cases discrimination will not be presupposed by the court, although the discrimination is open to proof. It will accept the interpretation of such act by the Supreme Court of the state as to its application upon all business or merely that of a foreign nature.<sup>104</sup> From the facts as presented it attempts to work out a solution which will not prove discriminatory and force the plaintiff to forego his constitutional rights.<sup>105</sup>

#### CONTROL OF FOREIGN CORPORATIONS BY THE STATE AND THE EXTENT TO WHICH THEY RECEIVE PROTECTION BY THE FEDERAL GOVERNMENT UNDER THE COMMERCE CLAUSE

This problem is one of the severest and most complicated which confronts the lawyer today, and one that has for him many complex relationships upon which the courts have as yet failed to formulate an iron-bound rule. It is yet a question whether such a rule is possible, and if so, advisable, under present conditions of economic advance. That the framers of the Constitution had no conception of the growth of commerce under such corporate entities as are today created by state and federal action seems certain,<sup>106</sup> and consequently the development of the law on this question is wholly due to the process of construction.

The corporation has always been looked upon by the law as a creation of the state, and thus distinctions have been drawn between such a creation and the individual. It is not a citizen within the meaning of that clause in the Constitution<sup>107</sup> which guarantees to

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<sup>103</sup> Hinson v. Lott, 8 Wall. 148; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.

<sup>104</sup> Howe Machine Co. v. Gage, 100 U. S. 676.

<sup>105</sup> As was done in Reymann Brewing Co. v. Brister, 179 U. S. 445, holding the Dow Law of Ohio valid.

<sup>106</sup> See South Carolina v. United States, 199 U. S. 437.

<sup>107</sup> Article 4, Section 2.

each citizen the privileges and immunities of the citizens of any other state,<sup>108</sup> though under the "due process of law" clause in the Fourteenth Amendment it is conceded that the corporation is a person.<sup>109</sup> The general doctrine, then, that the court has laid down is that, since a corporation is solely the creature of the state under whose laws it is constituted, it possesses no such thing as a right to do business in another state outside the limits of the jurisdiction from whence it derives its powers. This right is thus transferred into a privilege, for rights are not secured in other states by their grant of corporate existence; but such privileges depend upon the comity of the other state and its assent, such privileges as the right to do business, the recognition of its corporate existence, and its ability to secure the enforcement of its contracts.<sup>110</sup> The state can give its assent in many ways, but the commonest way, and that with which we are concerned, is the payment of a tax which is made the condition precedent to its doing any business whatever within the state, or to the right of maintaining proceedings in the courts of the state. A state can then go so far as to prohibit the transaction of business therein by a foreign corporation, or make such business possible only upon payment of the above-mentioned tax.<sup>111</sup> There is no provision then which forbids a state from discriminating between its own corporations and those of another state.<sup>112</sup>

There are, however, distinct limitations to this broad doctrine.<sup>113</sup>

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<sup>108</sup> *Paul v. Virginia*, 8 Wall. 168; *Blake v. McClung*, 172 U. S. 239.

<sup>109</sup> *Paul v. Virginia*, *supra*.

<sup>110</sup> *Paul v. Virginia*, *supra*.

<sup>111</sup> *Paul v. Virginia*, 8 Wall. 168; *Liverpool Insurance Company v. Massachusetts*, 10 Wall. 566; *Ducat v. Chicago*, 10 Wall. 410; *Philadelphia Fire Association v. New York*, 119 U. S. 110; *Hooper v. California*, 155 U. S. 648; *Nutting v. Massachusetts*, 183 U. S. 553; *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246; *Allgeyer v. Louisiana*, 165 U. S. 578; *Horn Silver Mining Co. v. New York*, 143 U. S. 305.

<sup>112</sup> *Ducat v. Chicago*, 10 Wall. 410.

<sup>113</sup> The broad nature of *Paul v. Virginia* has been a subject of great dispute, and the court has cautioned its appellants from attempting to interpret it too broadly. The chariness of the court to accept this doctrine in full is to be seen in *Insurance Co. v. Morse*, 20 Wall. 445, where, in speaking of *Paul v. Virginia*, the learned judge said: "The general language of the learned justice is to be expounded with reference to the judgment before him."

They are in the main three, of which two only will be discussed at present. It does not apply to corporations which are engaged in carrying on interstate commerce, and secondly to corporations in the federal employ.<sup>114</sup> This business must, however, be strictly interstate commerce, and the term carrying on interstate commerce is limited to acts of such corporations as common carriers<sup>115</sup> and telegraph companies,<sup>116</sup> and such others who actually afford facilities whereby commerce is carried on between the states.<sup>117</sup> It does not include manufacturing<sup>118</sup> and trading companies making interstate

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<sup>114</sup> Justice Field, the same judge who delivered the opinion in *Paul v. Virginia*, pointed out these two exceptions in very specific language in *Horn Silver Mining Company v. New York State*, 143 U. S. 305. The same exceptions are pointed out in *Pembina Silver Mining and Milling Company v. Pennsylvania*, 125 U. S. 181.

<sup>115</sup> *Norfolk & Western Railway Company v. Pennsylvania*, 136 U. S. 114; *McCall v. California*, 136 U. S. 104; *Pullman Co. v. Kansas ex rel. Coleman*, 216 U. S. 56; *Fargo v. Stevens*, 121 U. S. 230; *Clyde Steamship Co. v. City Council of Charleston*, 76 Fed. 46.

<sup>116</sup> *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1. The state may tax the property of the telegraph company within its own borders as a tax on property (*Western Union Telegraph Co. v. Taggart*, 163 U. S. 1), provided that such a tax is not so arbitrary as to operate as a privilege tax (*Com. v. Smith*, 92 Ky. 38). But for reasonable expense for inspection and regulation the state may go so far as to impose a pole and wire tax (*Philadelphia v. Western Union Tel. Co.*, 82 Fed. 797).

<sup>117</sup> This applies to express companies doing an interstate business (U. S. Express Co. v. Hemmingway, 39 Fed. 60), but not to insurance companies, whether fire (*Paul v. Virginia*, 8 Wall. 168), or marine (*Hooper v. California*, 155 U. S. 648), or mutual life insurance companies (*New York Life Insurance Company v. Cravens*, 178 U. S. 389); also, it does not apply to pipe-lines engaged in interstate transportation (*Tide Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516).

<sup>118</sup> This distinction is no doubt due to the fact that the court has always recognized the distinction between mere manufacture and commerce, and has maintained the fact that manufacture is not an essential part of commerce; as see the *United States v. E. C. Knight Co.*, 156 U. S. 1, and *Kidd v. Pearson*, 128 U. S. 1. See also, in distinct relation to above question, *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, where a foreign corporation entered into a contract within the state for the erection of a factory where the product should be manufactured, and the fact that this product was destined for use outside the state was held not to exempt the foreign corporation from compliance with the state statutes. In accord is *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238.

shipments. This attitude is, of course, due to the fact that the right to regulate interstate commerce is of an exclusive nature and it can brook no interference from the several states. The question whether the business of such corporations is within the meaning of the commerce clause interstate commerce is one of fact and is to be determined by the proper tribunal.<sup>119</sup> Thus, there can be said to be no essential difference as to the validity of a tax on interstate commerce, whether such commerce is carried on by an individual or a corporation,<sup>120</sup> and the same rule of law holds for both.

The same regulation holds for corporations engaged in the federal employ. Its growth is to be traced from the principle first enunciated in *McCulloch v. Maryland*,<sup>121</sup> that the tax on such a corporation is in its essence a regulation of the agencies of the federal government by the state and may mean the destruction, or at least the subordination of the federal government to state jurisdiction. Thus, corporations engaged in the execution of contracts for the federal government have been protected from state interference or control.<sup>122</sup> Corporations organized and created by federal law are also immune from state regulation, but as such corporations are usually created for the purpose of carrying on interstate commerce exclusively under the power given the federal government under the commerce clause, these corporations would be governed by the rule of law applied to the first class of corporations just mentioned.

We can then sum up the power of the state over corporations of this class by stating that it does not extend to the power of exclusion or of the imposition of conditions upon the transaction of their business within the state, but the state can only tax such portion of their property which is situated or employed within the state.<sup>123</sup>

The third limitation upon the power of a state by taxation or otherwise to control a foreign corporation rests upon the interpre-

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<sup>119</sup> *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239.

<sup>120</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

<sup>121</sup> 4 Wheat. 316.

<sup>122</sup> *U. S. to use, etc., v. Fidelity Guaranty Co.*, 178 Fed. 721, Cir. Ct. E. D. of Penn.

<sup>123</sup> For a discussion of this topic, see portion of this article under the title, "Taxation of Property."

tation of what is meant by the phrase "doing business in the state." If this business is in itself a transaction of interstate commerce, the corporation has been held to be exempted from the necessity of qualifying according to the state regulations, and the courts have held that it "is not doing business" within the meaning of such acts. As to what constitutes a transaction of interstate commerce, and where and how the line between such transactions and the ordinary fact of "doing business" can be drawn, is a matter of perplexing difficulty and the law can only be laid down by a review of federal and state decisions on the subject. Thus, a single act or transaction by a foreign corporation in another state has been construed as an act of interstate commerce, and for such a purpose the corporation is not compelled to register according to state law so as to enforce the execution of its contracts.<sup>124</sup> Such a single act constitutes a sale by a corporation to a person within the state, and thus establishes the relationship of vendor and vendee between the corporation and its customer. It will be noticed that this doctrine finds its basis in that of Chief Justice Marshall in *Brown v. Maryland*,<sup>125</sup> namely, that the power to regulate commerce must be capable of authorizing the sale of those articles which it introduces.

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<sup>124</sup> It was upon this basis that a single act of business could not be said to be carrying on business that the Cooper Manufacturing Company was upheld in its contention that it could secure the enforcement of a contract by which it had sold machinery manufactured in New Jersey to a firm in Colorado, although it had not complied with the state regulations. *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727. The concurring opinion of Justices Matthews and Blatchford construed such interference by the state as an interference with interstate commerce (113 U. S. 736, 737), and thus foreshadowed the present tendency in regard to such acts. Thus, in *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.* (1910), 244 Ill. 354, 91 N. E. 480, the Supreme Court of Illinois held that a single transaction within the state by a foreign corporation does not constitute doing business within the meaning of the foreign corporation act. The same attitude was taken in *Mergenthaler Linotype Co. v. Hays*, 182 Mo. App. 113, 168 S. W. 239; in *Hildreth Granite Co. v. Freeholder of Hudson*, 87 N. J. Eq. 316, 100 Atl. 158; in *Vermont Farm Machine Co. v. Ash*, 23 N. Mex. 647, 170 Pac. 741; in *Fuller v. Allen*, 46 Okla. 417, 148 Pac. 1008; *Oregon Commercial Bank v. Sherman*, 28 Ore. 573, 43 Pac. 658; *Barse Live Stock Company v. Range Valley Cattle Co.*, 16 Ut. 59, 50 Pac. 630; *Weiser Land Co. v. Bohier*, 152 Pac. 869.

<sup>125</sup> 12 Wheat. 419.

Therefore, it follows that since the states have no power to prohibit the introduction of an article they can also place no restrictions upon its sale. It is immaterial whether the person introducing and then selling such articles is natural or artificial, an individual or a corporation, so long as such person is engaged in the prosecution of commerce among the several states.<sup>126</sup> This sale, however, must be wholly incidental to and necessary to the fact of importation. Importation must occur as a consequence of sale; and thus, in other words, acts done upon previous contracts of sale which involve transportation from without the state constitute interstate commerce and as such cannot be construed as "doing business" within the meaning of any such regulative state acts.<sup>127</sup> This principle extends not only to the sale of the products of the corporation but also to such acts which are construed to be interstate commerce, such as

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<sup>126</sup> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

<sup>127</sup> Thus, a contract made in Arkansas for the purchase of books to be shipped from Tennessee and resold in Arkansas does not bring the corporation under the ban of the statute prohibiting a foreign corporation from doing business in Arkansas without obtaining permission. Robertson v. Southwestern Co., 136 Ark. 417, 206 S. W. 755. The connection between transportation and sale is clearly brought out in London v. Public Utilities Commission, 234 Fed. 152, when such transportation and sale by a Delaware corporation of natural gas procured in Oklahoma and delivered in Kansas and Missouri was construed as being interstate commerce. In Dinuba Farmers' Union Packing Co. v. J. M. Anderson Co., 193 Mo. App. 236, 182 S. W. 1036, a California corporation sold raisins to a St. Louis Grocery Company through a selling agent in San Francisco and a broker in St. Louis, and such transaction was held to be interstate commerce. Again, goods sold f. o. b. at a point outside a state to be shipped to a buyer within the state, who sells them at retail, cannot be held to be doing business. J. R. Watkins Medical Company of Winona, Minn., v. Coombes, 166 Pac. 1072. Again, carrying merchandise from Texan ports to foreign ports constitutes foreign commerce. W. B. Clarkson Co. v. Gans S. S. Line, 187 S. W. 1106. In Chase-Hackley Piano Co. v. Griffen, 149 N. Y. Supp. 998, it was decided that a foreign corporation which simply consigns goods to merchants for sale, the contracts being subject for approval of the corporation in another state, is not doing business in New York. "The act that local dealers sell the goods in their own names, under conditional sale agreements, and then assign such contracts to the corporation, which retains title until the entire purchase price is paid, and collects the installments through its agents in New York, is a mere incident to interstate commerce." THE CORPORATION JOURNAL, No. 46.

the execution of a mortgage deed of trust outside of the state<sup>128</sup> by one foreign corporation to another foreign corporation, covering real property within the state; executing a mortgage within a state on property within that state to secure an indebtedness to a foreign corporation;<sup>129</sup> taking a single assignment of an instalment contract for the sale of a piano;<sup>130</sup> the giving of notes for indebtedness by a foreign corporation;<sup>131</sup> collection of a debt or taking a mortgage to secure it;<sup>132</sup> taking subscriptions to its own stock;<sup>133</sup> the bringing of a suit by a national bank in the courts of the state;<sup>134</sup> the mere act of holding real estate;<sup>135</sup> acting as a stockholder in a domestic corporation.<sup>136</sup> These acts determine their nature wholly from the facts of the case, and it will be observed that the acts fall either into the class of transactions which constitute interstate commerce or into a class which involves no active participation in business but constitutes either sole possession or mere passive ownership.

It is now but a step from a transaction between the corporation and another person establishing the relationship of vendor and vendee to that of where an intermediary position is occupied by an agent of the corporation. The principle underlying the drummer

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<sup>128</sup> Continental Trust Co. v. Tallasee Falls Mfg. Co., 222 Fed. 694.

<sup>129</sup> Covey Cotton Oil Co. v. Bank of Ft. Gaines, 15 Ala. App. 529, 74 So. 87.

<sup>130</sup> Bullfrog, Goldfield R. Co. v. Jordan, 174 Cal. 342, 163 Pac. 40.

<sup>131</sup> Plew v. Board, 274 Ill. 232, 113 N. E. 603.

<sup>132</sup> Ichenhauser Co. v. Landrum's Assignee, 153 Ky. 316, 155 S. W. 738.

<sup>133</sup> Hauger v. International Trading Co., 184 Ky. 794, 214 S. W. 438, and Denman v. Kaplan, 205 S. W. 739 (Tex. Ct. App.).

<sup>134</sup> Hieston v. National City Bank of Chicago, 132 Md. 389, 104 Atl. 281.

<sup>135</sup> Broadway Bond St. Co. v. Fidelity Printing Co., 170 S. W. 394. But see Donaldson v. Thousand Springs Power Co., 29 Ida. 735, 162 Pac. 334, where taking title to real estate in behalf of a corporation was considered to constitute doing business. In accord with the former case is the opinion of the Attorney-General of North Carolina in his biennial report, p. 83 (cited from THE CORPORATION JOURNAL, No. 51). Where the chief purpose of the corporation is that of taking over land already bought, such a transaction, even if single, was deemed to be the doing of business. Weiser Land Co. v. Bohier, 78 Ore. 202, 152 Pac. 869.

<sup>136</sup> Toledo Traction, etc., Co. v. Smith et al. (U. S. District Court), 205 Fed. 643, but the opposite view was taken when the section of such stock amounted to a controlling interest. Central Life Securities Co. v. Smith, 236 Fed. 170.

cases as enunciated in *Robbins v. Shelby County Taxing District*<sup>137</sup> seems to be developed with full force in this field. As long as this agent retains the character of a solicitor or drummer for this corporation, in which he secures orders for the goods of this corporation,<sup>138</sup> which are then shipped either directly to the customer<sup>139</sup> or to him, only upon his order, to be delivered to the customer,<sup>140</sup> such transactions are considered to be essential to and a part of interstate commerce and the corporation cannot be forced to comply with state regulations on the ground that it is "doing business" within the state. It is of no consequence to this general principle that the agent may carry with him a stock of samples so as to promote and facilitate sales,<sup>141</sup> or even when the corporation may go so far as to maintain an office where records may be kept and a competent office force employed, provided that no orders are filled directly from such office but from the corporation's factory, the office then being considered as a part of the complete transaction

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<sup>137</sup> 120 U. S. 489.

<sup>138</sup> Mere solicitation of business by agents does not constitute doing business. *Pembleton v. Illinois Commercial Men's Ass'n*, 289 Ill. 99, 124 N. E. 355; *Am. Contractor Pub. Co. v. Michael Nocente Co.* (Sup. Ct. App. Div., First Dept.), 139 N. Y. Supp. 853 (where an office was kept for the purpose of collecting news and soliciting contracts for advertisements); *McDowell v. Starobin Electrical Supply Co., Inc.*, 104 Misc. 596, 172 N. Y. Supp. 221; *Loeb v. Star and Herald Co.*, 187 App. Div., 175 N. Y. Supp. 412; *Fruit Dispatch Co. v. W. B. Wood and R H. Wood, etc.*, 42 Okla. 79, 140 Pac. 1138; *Bertin & Lepou v. Mattison*, 69 Ore. 470, 139 Pac. 330; *Dunn-Salmon Co. v. Edwards*, 60 Pa. Sup. Ct. Rep. 340.

<sup>139</sup> *Morrisville Trust Co. v. Bayer Steam Soot Blower Co.*, 166 Ky. 744 179 S. W. 1034; *Badische Lederweike v. Capitelli* (N. Y. Sup. Ct. Fulton County), 92 Misc. 260, 155 N. Y. S. 651; *International Text Book Co. v. Tone*, 220 N. Y. 313, 115 N. E. 914 (where the product shipped consisted in instruction by correspondence); this was made the ruling case law by the decision of the U. S. Supreme Court in *International Text-Book Co. v. Pigg*, 217 U. S. 91.

<sup>140</sup> *City of Lee's Summit et al. v. Jewel Tea Co.*, 217 Fed. 965 (agents held not to be subject to license taxes on vendors imposed by local ordinances); *Western Oil Refining Co. v. Dalton*, 131 Tenn. 329, 174 S. W. 1138 (oil shipped in tank cars).

<sup>141</sup> *M. E. Smith & Co. v. Dickenson et al.*, 81 Wash. 465, 142 Pac. 1133 (where agent had an office at which he exhibited samples); *Larkin Co. v. Commonwealth*, 172 Ky. 106, 189 S. W. 3 (where company advertised its goods by "traveling showrooms").

of interstate commerce.<sup>142</sup> This office must, however, handle only such business as is wholly interstate in character, and may not participate in such intrastate business as will result in its becoming for all purposes a branch office with the same powers as the main seat of the corporation.<sup>143</sup> The procedure which those offices which come within the law must in general adopt is that all contracts which they make with the consumer are to be executed subject to approval by the home office.

Agents and offices of transportation companies are in all cases, when their object is that of soliciting trade for their business, engaged in interstate commerce, and as such are immune<sup>144</sup> from the necessity of conforming to the state regulations.

When the office of the foreign corporation partakes of the nature of a warehouse which stores goods ready for shipment on the order of the customer and not on a previous contract of sale, the corporation is then considered to be doing business within the state.<sup>145</sup> It is of no material difference whether the title is to remain in the corporation until bona fide sales are made in the due course of business.<sup>146</sup> The principle here has a substantial basis, for the points of shipment from the warehouse to the consumer lie wholly within the state, and the mere intent of the home office to ship to the consumer cannot be considered to place the article within the control of Congress as interstate commerce,<sup>147</sup> and thus the goods while

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<sup>142</sup> Cheney Bros. Co. v. Commonwealth, 218 Mass. 558, 106 N. E. 310, affirmed by the Supreme Court of the U. S. in 246 U. S. 147; also see other cases in the same report of the U. S. Supreme Court affirming the same principle.

<sup>143</sup> See 246 U. S. 147; also Electric Specialties Co. v. Rosenbaum, 102 Misc. 520, 169 N. Y. Supp. 157.

<sup>144</sup> Vicksburg S. & P. Ry. v. De Bow, 148 Ga. 738, 98 S. E. 381; Takacs v. Philadelphia & R. Ry. Co., 228 Fed. 728; Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264; Erie Beach Amusement, Limited, v. Spirella Co., Inc., 173 N. Y. Supp. 626, 105 N. Y. Misc. 170; Phila. & Gulf Co. v. Clark, 59 Pa. Sup. Ct. 415 (steamship company).

<sup>145</sup> American Car Co. v. Grasse Contracting Co., 102 Misc. 230, 168 N. Y. Supp. 689. But see Mitchell Wagon Co. v. Poole, 235 Fed. 818, which holds almost opposite.

<sup>146</sup> E. A. Lange Medical Co. v. Brace et al., 186 Mich. 453; 152 N. W. 1026; Bailey v. Parry Mfg. Co., 59 Okla. 152, 158 Pac. 581.

<sup>147</sup> Coe v. Errol, 116 U. S. 517.

detained at the warehouse must be considered to have lost their character of articles of interstate commerce.<sup>148</sup>

The agent also cannot dispose of goods shipped to him in ordinary retail, whether in original packages or not.<sup>149</sup> This principle applies in such cases where the agent has the goods with him at the time when the contract is made and then disposes of them to the customer.<sup>150</sup> The agent is also forbidden to dispose of any samples that he may have with him, as such action constitutes the doing of business. In cases where the agent takes the title of the goods and resells, the transaction in which the corporation is concerned is terminated with the disposal of the goods to the agent, which transaction constitutes interstate commerce, and therefore when the agent again sells the goods the corporation is not doing business within the state. Such agents, however, may not resell as if they were acting for the corporation, and are not permitted to use the name of the corporation for the purpose of promoting their trade.<sup>151</sup>

There is one principle upon which the various decisions reveal much complexity, namely, when the agent of the foreign corporation has goods consigned to him which he retains and then sells, but the selling is done upon a commission basis. The agent generally has no authority to bind the company by warranty or otherwise, and no sale is considered to be valid until approved by the home office, while the title of goods remains with the corporation until sale.<sup>152</sup> Such a method of sale on commission has been in general construed by the courts as not "doing business" within the state and such corporations have not been required to conform with the state regulations in order to secure the enforcement of their con-

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<sup>148</sup> This follows out the basic idea underlying *Brown v. Houston*, 114 U. S. 622, and *American Steel and Wire Co. v. Speed*, 192 U. S. 500.

<sup>149</sup> *J. R. Watkins Medical Co. v. Williams*, 124 Ark. 539, 187 S. W. 653; *Wilson & Co. v. Bazaar*, 168 N. Y. Supp. 188.

<sup>150</sup> *Miellmier v. Toledo Scale Co.*, 128 Ark. 211, 193 S. W. 497; *Jenkes v. Royal Baking Powder Co.*, 131 Minn. 335, 155 N. W. 103; *Prigge v. Selz, Schwab & Co.*, 134 Minn 245, 158 N. W. 975.

<sup>151</sup> *Shores-Mueller Co. v. Palmer*, 216 S. W. 295.

<sup>152</sup> As were the conditions under which *Waltman & Bryant of Oklahoma* sold the defendant's cars in Osage County, Oklahoma, in the case of *Auto Trading Co. v. Williams*, 177 Pac. 583.

tracts.<sup>153</sup> That such an arbitrary distinction should be made, by which the transaction can still be deemed to come within the pale of interstate commerce, seems unnecessary. The principle that the goods, when having reached their final destination, which in this instance can be no more than the destination to which they were consigned, have ceased to be articles of commerce, should apply, and the fact that a commission basis is the sale arrangement cannot extend the character of an article of commerce to a greater degree. This fact that the courts have failed in all its fullness to recognize, namely, that interstate commerce should be an unbroken transaction from vendor to vendee, and such vendor and vendee must be situated in different states, has led to the greatest diversity in decisions on this question.<sup>154</sup>

If the agent goes so far as not only to deliver the product, which is consigned directly to the consumer, but also to install such product, the corporation is then "doing business" within the state. This installation is held to be an act intrastate in character and to be a part of local business, attempting, as it does, to make the articles of interstate commerce a part of the state property. Such a view as this was taken by the Supreme Court,<sup>155</sup> although it hinted that in some cases, because "of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was

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<sup>153</sup> *Eastman v. Tiger Vehicle Co.* (Tex. C. App.), 195 S. W. 336 (where products were shipped and sold during a fair by agents upon a commission basis and the corporation was not forced to secure a permit); *J. J. Cooper Rubber Co. v. Johnson*, 133 Tenn. 562, 182 S. W. 593 (where automobile tires were shipped to a local company for sale on a commission basis); *Auto Trading Co. v. Williams*, 177 Pac. 583 (for facts, see *supra*). Cases which adopt a reverse viewpoint are *Grams v. Idaho Nat. Harvester Co.*, 105 Wash. 602, 178 Pac. 815 (where a harvester company placed with a warehouse company a list of parts for sale on commission to purchasers of machines, the articles being sold as the harvester company's); *Farrand Co. v. Walker*, 169 Mo. App. 602, 155 S. W. 68 (goods shipped on consignment to agent and sold on commission by him, but if goods are wrongfully retained by the agent the corporation may prosecute an action of replevin or trover against him).

<sup>154</sup> As see note immediately preceding.

<sup>155</sup> *Browning v. City of Waycross*, 233 U. S. 16 (where the installation of lightning rods accompanied their sale).

essential to the accomplishment of the interstate transaction."<sup>156</sup> Thus, if the installation can be satisfactorily accomplished and completed by local workmen, and special and technical knowledge is unnecessary for the purpose, the corporation, if it proceeds with such actions, is "doing business" within the state.<sup>157</sup>

In summing up these principles, it may well be said that any corporation can send its commercial travelers soliciting sales through other states and may ship goods to purchasers, and such business cannot be interfered with by the state. Such interstate commerce does not constitute a "doing of business" within the state. Again, a foreign corporation which has no warehouse, office or place of

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<sup>156</sup> *Browning v. City of Waycross*, 233 U. S. 16. Thus, in *Power Specialty Co. v. Michigan Power Co.*, 190 Mich. 609, 157 N. W. 408, the case was sent back for a new trial, as there was no evidence before the court as to whether this work could be done by the purchasers through local workmen. The work consisted in the installation of six superheaters in a power plant in Lansing. The Supreme Court of Michigan adopted the same test of "intrinsic or peculiar quality or inherent complexity" as a guide to the question of installing a ventilating system, in *B. F. Sturtevant Co. v. Adolph Leitelt Ironworks*, 196 Mich. 552, 163 N. W. 13. Installation of a soda fountain was considered a reasonable incident of sale so as to constitute a single act of interstate commerce, in *Puffer Mfg. Co. v. Kelly*, 198 Ala. 131, 73 So. 403. See also *Citizens' Nat. Bank v. Buckhett*, 14 Ala. App. 511, 71 So. 82. The erection of a pumping plant was held to be an incident of interstate commerce, in *Dempster Mill Mfg. Co. v. Hamphires*, 202 S. W. 981 (Tex. C. App.). The Supreme Court of Wisconsin took a very broad view in *S. F. Bowser & Co. v. Savidaskey*, 154 Wis. 76, 142 N. W. 182, where it held that the assembling and installing of machinery were merely incidents of interstate commerce.

<sup>157</sup> *B. F. Sturtevant v. Adolph Leitelt Ironworks*, 196 Mich. 552, 163 N. W. 13 (installation of ventilating system in defendant's plant); *In re Springfield Realty Co.*, 257 Fed. 785 (installation of automatic sprinklers); *Phillips Co. v. Everett*, 262 Fed. 341 (installation of automatic fire sprinklers); *Ensign v. Christiansen* (N. J. Sup. Ct.), 109 Atl. 857 (installation of lighting plant); *Buhler v. E. T. Burrowes Co.*, 171 S. W. 791 (installation of screens by agent); *York Mfg. Co. v. Colby*, 172 S. W. 206 (installation of ice manufacturing plant); *Peck-Hammond Co. v. Hamilton Independent School Dist.*, 181 S. W. 697 (Tex. C. App.) (erection of steam heating apparatus); *Bryan v. S. F. Bower & Co.*, 209 S. W. 189 (Tex. C. App.) (installation of gasoline container and pump); *General Railway Signal Co. v. Virginia*, 246 U. S. 500 (installing signal devices and equipment for a railroad); *Kinnear & Gager Mfg. Co. v. Miner*, 89 Vt. 572, 96 Atl. 333 (erection and installation of building materials).

business, and which neither incurs nor pays expenses for receiving, handling, selling or storing its goods, but merely consigns them to another factor (whether a corporation or not), who does all the above business, is not "doing business" within the state.<sup>158</sup>

#### THE GENERAL POWER OF THE STATE TO TAX PROPERTY AND ITS RELATION TO THE COMMERCE CLAUSE

It is a well recognized principle that a state possesses the power to tax property within its own jurisdiction. Such a tax on property because of its being within a state's borders must be distinguished accurately from such other taxes, with which we have already dealt, as taxes laid on transportation or on occupations, whether of an individual or a corporation. The question then naturally arises where and when is this restricted by the commerce clause. The fact that the property is used in interstate commerce is in itself no bar to state taxation,<sup>159</sup> and the fundamental test which should be applied is whether or not the property is situated within the territorial jurisdiction of the state.<sup>160</sup> On the other hand, a tax may not be placed on such property *because* it is used in interstate commerce,<sup>161</sup> as this would act as a burden upon such commerce. This

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<sup>158</sup> Butler Bros. Shoe Co. v. U. S. Rubber Co. (C. C. A., 8th Cir.), 156 Fed. 1. In this case it was stated that certain exceptions had been established to the doctrine of Paul v. Virginia, 8 Wall. 168, which it designated as three: (1) Every corporation, empowered by the state of its creation to engage in interstate commerce, may carry on that commerce in sound and recognized articles of commerce in every state of the Union, and obstructions and prohibitions to this by other states are unconstitutional and void. (2) Every corporation of every state which is in the employ of the United States has the right to exercise necessary corporated powers and to transact the requisite business to discharge duties of that employment in every other state of the Union without let or hindrance from the latter. (3) Every corporation has the right to institute suits in federal courts and to remove to these courts its suits in any other state on terms prescribed by acts of Congress.

<sup>159</sup> Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Western Union Tel. Co. v. Taggart, 163 U. S. 1.

<sup>160</sup> This test seems to have prevailed in the minds of the court in regard to the decision reached in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

<sup>161</sup> Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160 (here Justice Brewer collects all the decisions on this subject, eleven in number).

latter tax savors of a privilege tax as contradistinguished from the property tax. The line between the two is often very difficult to determine, and is determined mainly by the amount of the tax, whether excessive or not, or whether equal and uniform as required under the Fourteenth Amendment.

The test then is *situs*,<sup>162</sup> but *situs* itself is hard to determine where property is continually moving from state to state. An artificial *situs* has been created by congressional action<sup>163</sup> for vessels engaged in interstate commerce, which is the port nearest to which the owner or acting manager resides. The vessel is taxable here in the absence of an actual *situs* anywhere else, such as where it is engaged wholly within the limits of a state.<sup>164</sup> Thus, a vessel engaged in commerce between two states, discharging its cargo at their ports, is taxable by neither if enrolled in a third state.<sup>165</sup> A ferry company is likewise immune from a property tax on its boats in one state if they are situated in another.<sup>166</sup>

Bridges are also taxable, even though Congress has declared that railway bridges over navigable streams shall be regarded as post roads.<sup>167</sup> Where the bridge connects two states, each state may tax that part of the bridge within its jurisdiction.<sup>168</sup>

In regard to rolling stock, which is used and employed within the state, but where the various items are continually changing, the doctrine applied is that of "average habitual use," namely, that the

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<sup>162</sup> Thus, a state can tax grain elevators, although the grain in them is to be shipped without the state. *Cargill & Co. v. Minnesota*, 180 U. S. 452, and *Bacon v. Illinois*, 227 U. S. 504. Again, the mere intention to export cannot relieve tobacco before its removal from taxation. *Turpin v. Burgess*, 117 U. S. 504. (It will be noticed that here the doctrine of *Coe v. Errol*, 116 U. S. 517, as to intent of manufacturer to ship, is adopted.)

<sup>163</sup> REVISED STATUTES, U. S., Section 4141.

<sup>164</sup> *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (taxable by Virginia because it was engaged in commerce therein, although enrolled in another state).

<sup>165</sup> *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471.

<sup>166</sup> *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Gloucester Ferry Co v. Pennsylvania*, 114 U. S. 196.

<sup>167</sup> *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150.

<sup>168</sup> *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 626.

average number of cars, whether or not owned by a foreign corporation, employed as vehicles of interstate transportation are taxable.<sup>169</sup> This applies equally to refrigerator cars,<sup>170</sup> ordinary passenger and freight cars<sup>171</sup> and sleeping cars.<sup>172</sup> Where the plaintiff makes no objection to the correctness of the number of his cars that were assessed by the state officials, the presumption indulged in by the courts is that this number is correct.<sup>173</sup> In regard to railroads, telegraph lines, and telephone lines where the whole system extends through many different states and forms an organic unity, the doctrine of a "mileage basis" has been employed. Here such part of the valuation of the entire stock is taken for assessment purposes as the length of the line operated within the state is proportional to the entire length.<sup>174</sup> The real estate and machinery of the company, which are both subject to local taxation, are excluded and the market value of the shares of the company's stock may be taken for fixing the valuation of its entire property.<sup>175</sup> Many objections are raised to this method, such as that the valuation is based on property beyond the authority of the state to tax. But in general, if the preliminary total valuation be correct, and the different parts of the line may be assumed to be equal in value, no terminals in one state being equal in value to all the rest of the line through another state,<sup>176</sup> the final result achieved will fairly represent the value of such part of the line.<sup>177</sup>

It has been said before that no tax can be laid on property because it is engaged in interstate commerce: otherwise, if such a tax par-

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<sup>169</sup> Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149.

<sup>170</sup> Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149.

<sup>171</sup> Marye v. Baltimore & Ohio Railroad Co., 127 U. S. 117.

<sup>172</sup> Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18.

<sup>173</sup> Union Refrigerator Co. v. Lynch, 177 U. S. 149.

<sup>174</sup> Cleveland, Cincinnati & Chicago Ry. Co. v. Backus, 154 U. S. 439.

<sup>175</sup> Western Union Tel. Co. v. Taggart et al., 163 U. S. 1.

<sup>176</sup> As was said by Mr. Justice Holmes in Fargo v. Hart, 193 U. S. 490.

<sup>177</sup> In arriving at the average habitual use of sleeping cars in Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, there was taken such proportion of its capital stock as the number of miles of railroad over which the company's cars were run in that state bore to the whole number of miles traversed by them altogether. Also, in regard to an express company, the value of its property within the state was determined by a similar application of the unit rule in Adams Express Co. v. Ohio State Auditor, 165 U.

takes of a charge for special facilities. Thus, wharfage fees for vessels engaged in navigation are allowable,<sup>178</sup> as well as municipal taxation of poles and wires belonging to a telegraph company, which was in the nature of a rental for the use of their streets,<sup>179</sup> as also taxation where local government supervision is charged for.<sup>180</sup> It is immaterial whether such fees as wharfage are unreasonable, and relief must be sought in such cases for invoking the laws of the states, since the federal courts possess no power.<sup>181</sup> But when such fees are merely a disguise to control commerce<sup>182</sup> or discriminate<sup>183</sup> against products of other states, relief is granted. Unreasonableness, on the other hand, has been declared sufficient for declaring invalid charges for special facilities afforded because of local government supervision.<sup>184</sup>

We turn now to the question of the taxation of property acquired through interstate commerce, such as the earnings or receipts of a company engaged in such commerce, which are collectively spoken of as gross receipts. Gross receipts, a part of which are derived from commerce, have proved a vexatious question to the courts,<sup>185</sup>

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S. 194. In this case Mr. Justice Brewer was particularly vehement in upholding the theory, saying that "no finespun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

<sup>178</sup> *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, sustaining a wharfage fee laid by a municipal corporation.

<sup>179</sup> *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92.

<sup>180</sup> *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160; *Charlotte, Columbia, etc., R. R. Co. v. Gibbes*, 142 U. S. 386.

<sup>181</sup> *Ouachita & Mississippi Packet Co. v. Aiken et al.*, 121 U. S. 444.

<sup>182</sup> *Southern Steamship Co. v. Wardens of New Orleans*, declaring invalid a law imposing the sum of \$5 upon each vessel entering the port for the masters and wardens of that port.

<sup>183</sup> *Guy v. Baltimore*, 100 U. S. 434, holding invalid a provision for collecting wharfage from vessels landing goods other than the production of the state, while exempting all other vessels.

<sup>184</sup> *Western Union Tel. Co. v. New Hope*, 187 U. S. 419.

<sup>185</sup> For example, compare the decision of the court in *State Tax on Gross Receipts*, 15 Wall. 284, where tax by Pennsylvania upon the gross receipts of a railroad company was sustained on the ground that the tax, being collectible only once in six months, was laid upon a fund which has

but of recent years it has been definitely established that such a tax is an unconstitutional burden upon interstate commerce, and as such is invalid.<sup>186</sup> Thus, laws of various states taxing companies engaged in interstate commerce at a certain percentage upon their gross receipts have been declared invalid.<sup>187</sup> Receipts derived from the pursuit of purely intrastate commerce are taxable,<sup>188</sup> even where the route traversed goes partly outside the state.<sup>189</sup> Where a company derives its earnings partly from internal and partly from interstate commerce, the two may be separated, and a state may tax that part arising from internal commerce,<sup>190</sup> and if a state shall place a tax upon gross receipts the whole law will not be declared invalid, but only so much as applies to receipts derived from interstate commerce.<sup>191</sup> Another method which has been employed and declared

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become part of the general property of the company, with Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326, where a tax imposed upon the gross receipts of a steamship company derived from transportation was declared invalid, and Mr. Justice Bradley admitted that the doctrine of the former case was no longer tenable.

<sup>186</sup> Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227: "A state cannot lay a tax on interstate commerce in any form by imposing it either upon the business which constitutes interstate commerce, or the privilege of engaging in it, or upon the receipts as such derived from it." This position first found utterance in *Fargo v. Michigan*, 121 U. S. 230.

<sup>187</sup> Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217 (declaring invalid the Texas act of April 17, 1905, laying a tax "equal to 1 per centum of their gross receipts" as applied to railway companies); *Meyer v. Wells-Fargo & Co.*, 223 U. S. 298 (declaring gross revenue tax law of Oklahoma, 1910, is inapplicable to a non-resident express company whose receipts are largely derived from interstate commerce and investment in bonds and land outside the state).

<sup>188</sup> *Fargo v. Michigan*, 121 U. S. 230; *Western Union Tel. Co. v. Alabama State Board of Assessment* (*Western Union Tel. Co. v. Seay*), 132 U. S. 473.

<sup>189</sup> *United States Exp. Co. v. Minnesota*, 223 U. S. 335; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192 (no breaking of bulk or transfer of passengers in the other state).

<sup>190</sup> *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576.

<sup>191</sup> *United States Exp. Co. v. Minnesota*, 223 U. S. 335; *Western Union Tel. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 473; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411. In cases where the interpretation of the effect of such an act is in doubt the court will follow the interpretation laid down by the supreme court of the state. *Pullman Co. v. Knott*, 235 U. S. 23.

valid is imposing the tax upon the receipts of a railroad company ascertained by dividing the gross transportation receipts by the total number of units operated, thus obtaining the average gross receipts per mile, then multiplying this by the number of miles operated within the state and calling this the receipts derived from internal commerce.<sup>192</sup> A state may make a corresponding increase in the tax decimal upon intrastate earnings so as to counterbalance the amount excluded because of its interstate character.<sup>193</sup> A tax imposed upon a manufacturing company and measured by the amount of sales of goods manufactured in the local factory, whether sold within or without, either in domestic or interstate commerce, is not an unconstitutional regulation of interstate commerce,<sup>194</sup> such taxes being upon an occupation<sup>195</sup> and not upon the fact of commerce. On the other hand, a tax based upon gross receipts for merchandise shipped to other countries is invalid.<sup>196</sup>

*Princeton, New Jersey.*

J. M. LANDIS.

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<sup>192</sup> Maine v. Grand Trunk Ry. Co., 142 U. S. 217. This is certainly a more profitable proposition from the viewpoint of the state, unless the greater portion of receipts be derived from internal commerce.

<sup>193</sup> Though the opposite was intimated in Allen v. Pullman's Palace Car Co., 191 U. S. 171, the above proposition was held valid in Ohio River & W. R. Co. v. Dittey, 232 U. S. 576.

<sup>194</sup> American Manufacturing Co. v. St. Louis, 250 U. S. 459. In accord is U. S. Glue Co. v. Oak Creek, 247 U. S. 329.

<sup>195</sup> Clark v. Titusville, 184 U. S. 329.

<sup>196</sup> Crew-Levick Co. v. Pennsylvania, 245 U. S. 292.